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12
13 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 IN AND FOR THE COUNTY OF ALAMEDA

15 CENTER FOR BIOLOGICAL DIVERSITY
AND SIERRA CLUB,

16 Plaintiffs/Petitioners,

17 v.

18 CALIFORNIA DEPARTMENT OF
19 CONSERVATION, DIVISION OF OIL, GAS,
20 AND GEOTHERMAL RESOURCES, et al.,

21 Defendants/Respondents,

22 AERA ENERGY LLC, et al.,

23 Respondents-in-Intervention, and

24 WESTERN STATES PETROLEUM
ASSOCIATION, et al.,

25 Respondents-in-Intervention.
26
27
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Case No: RG15769302

ASSIGNED FOR ALL PURPOSES TO
JUDGE GEORGE C. HERNANDEZ, JR.
DEPARTMENT 17

**UPDATED JOINT COMPLEX CASE
MANAGEMENT STATEMENT**

Date: February 4, 2016

Time: 2:30 p.m.

Dept: 17

Judge: Hon. George C. Hernandez

Action Filed: May 7, 2015

Hearing Date: July 15, 2016

1 The parties (“Parties”) to the above-entitled action submit this UPDATED JOINT
2 COMPLEX CASE MANAGEMENT STATEMENT pursuant to the Court’s Case Management
3 Order dated January 7, 2016, the General Guidelines for Litigating in Department 17, and the case
4 management statement instructions provided in the Court’s order dated June 11, 2015.

5 **A. Background of case.**

6 Plaintiffs Center for Biological Diversity and the Sierra Club (“Plaintiffs”) have brought this
7 action against the California Department of Conservation, Division of Oil, Gas and Geothermal
8 Resources (“DOGGR”) challenging DOGGR’s authorization of oil industry injections of wastewater
9 and other fluids into California aquifers that Plaintiffs allege are protected under the Safe Drinking
10 Water Act (“SDWA”) and require exemptions before injections into them are lawful. DOGGR has
11 primary responsibility for the administration of SDWA requirements governing these underground
12 injections in California, known as “Class II” injections, pursuant to a grant of primacy from the U.S.
13 Environmental Protection Agency to DOGGR in 1983.

14 Plaintiffs’ complaint, filed on May 7, 2015, contains two causes of action. First, Plaintiffs
15 seek declaratory relief under the California Administrative Procedure Act (“APA”), alleging that
16 DOGGR has violated the APA by promulgating emergency regulations titled the “Aquifer
17 Exemption Compliance Schedule Regulations,” which allow Class II injections into aquifers lacking
18 exemptions to continue until as late as 2017. Second, Plaintiffs seek a writ of mandate, pursuant to
19 Code of Civil Procedure section 1085, declaring that DOGGR has violated its mandatory duty to
20 prohibit Class II injections into non-exempt aquifers. Plaintiffs’ requested relief asks this Court to
21 void DOGGR’s emergency regulations and issue a writ that requires DOGGR to take all actions
22 necessary and available to it to immediately meet its mandatory duty to prohibit Class II injections
23 into protected aquifers. Additional, detailed descriptions of the case’s factual background were filed
24 with this Court by Plaintiffs in their May 14, 2015 Motion for Preliminary Injunction, as well as by
25 Defendant DOGGR in its June 19, 2015 Opposition to Plaintiffs’ Motion for Preliminary Injunction.
26 (See Pl. Mot. for PI (May 14, 2015) at 1-4; Def. Opp. to PI (June 19, 2015) at 2-4.)

27 Respondents-in-Intervention Aera Energy LLC, Berry Petroleum Company LLC, California
28 Resources Corporation, Chevron U.S.A. Inc., Freeport-McMoRan Oil & Gas LLC, Linn Energy

1 Holdings LLC, and Macpherson Oil Company (“Energy Companies”) and Western States Petroleum
2 Association, California Independent Petroleum Association, and Independent Oil Producers Agency
3 (“Industry Groups”) filed motions to intervene on May 29, 2015, and were granted intervention on
4 June 16, 2015. Respondents-in-Intervention also described the case background in their Oppositions
5 to Plaintiffs’ Motion for Preliminary Injunction. (Energy Companies’ Opp. to Pl. Mot. for PI (June
6 19, 2015) at 2-6); Industry Groups’ Opp. to Pl. Mot for PI (June 19, 2015) at 3-6.)

7 Defendant DOGGR and Respondents-in-Intervention Energy Companies and Industry
8 Groups (collectively, “Opposing Parties”) demurred to Plaintiffs’ complaint. Following a hearing on
9 September 30, 2015, the Court issued three separate orders on October 5, 2015, overruling the
10 Opposing Parties’ three separate demurrers. In its orders, the Court also ordered Opposing Parties to
11 file answers within 20 days of the Court’s mailing of its decisions on the demurrers.

12 DOGGR, Energy Companies, and Industry Groups each filed an answer on October 30,
13 2015.

14 Energy Companies filed a Motion for Summary Adjudication on December 14, 2015, which
15 is scheduled to be heard on March 3, 2016.

16 **B. Parties and their positions.**

17 The Parties to this case are Plaintiffs Center for Biological Diversity and Sierra Club; named
18 defendant DOGGR; and two groups of Respondents-in-Intervention—Energy Companies and
19 Industry Groups.

20 **C. Deadlines and limits on joinder of parties and amended or additional pleadings.**

21 The Parties do not anticipate joinder of additional parties. Plaintiffs reserve the right to
22 move, pursuant to Code of Civil Procedure section 464, for supplementation of the Complaint should
23 new, relevant facts arise. Opposing Parties reserve their respective rights to supplement their
24 answers, file amended answers, or demur to any amended or supplemental complaint.

25 Opposing Parties request a deadline for Plaintiffs’ filing of any motion to amend or
26 supplement the Complaint; specifically, Opposing Parties request that Plaintiffs file any such motion
27 by 20 days after the date the record is certified. Plaintiffs disagree with this deadline, for the reasons
28 described below.

1 **D. Class discovery and class certification.**

2 There are no class discovery or class certification issues in this case.

3 **E. Proposed schedule for the conduct of the litigation.**

4 On January 9, 2016, following case management conferences on December 9, 2015 and
5 January 6, 2016, the Court issued a written order setting a date of July 15, 2016 for a dispositive
6 hearing on both Plaintiffs' APA cause of action and section 1085 petition for writ of mandate. At
7 the January 6 case management conference, the Court asked the parties to work on a proposed
8 briefing schedule, as well as come to agreement on when DOGGR would certify the record in
9 advance of the July 15 hearing date.

10 As described below, the parties again submit alternative case management schedules, having
11 been unable to come to agreement. The parties are also not in agreement regarding the proper scope
12 of the record in this action, including questions regarding the relevance of information sought via
13 recent notices of deposition that Energy Companies served on Earthjustice, which Plaintiffs will be
14 opposing.

15 The parties also request that the Court apprise the parties whether the Court wants the record
16 to be prepared electronically or lodged as a hard copy.

17 Plaintiffs' position:

18 Plaintiffs submit that this case should be briefed on the record evidence to be assembled and
19 certified by DOGGR, with limited record supplementation occurring, if at all, pursuant to Court
20 approval under applicable administrative law rules.

21 Following the conclusion of briefing, Plaintiffs submit the case can be argued before the
22 Court in an appellate-style argument in a single day.

23 *a. The Record*

24 Now that the Court has ordered a hearing date of July 15, 2016, Plaintiffs respectfully request
25 that the Court order DOGGR to certify the record in this case in a time frame that affords Plaintiffs
26 sufficient time to brief their APA cause of action and section 1085 petition for writ of mandate,
27 without compromising the scheduled hearing date. DOGGR has proposed to certify a record by
28 April 22 and Plaintiffs do not object to that date so long as it is a date certain, and so long as

1 Plaintiffs are permitted to file a single, joint brief that addresses both their APA cause of action and
2 section 1085 petition for writ of mandate. As provided below, Plaintiffs propose filing their opening
3 brief on May 18, which will be 26 days after DOGGR certifies the record, a reasonable number of
4 days particularly given that Plaintiffs will not be able to preview the writ of mandate record prior to
5 its certification. Given that the regulations Plaintiffs challenge here will expire in February 2017, it
6 is critical to Plaintiffs that the merits of this action be heard as soon as is practicable. As previously
7 noted, timely resolution of the merits is critical to the issue at the heart of this action, which
8 challenges DOGGR's failure to act in accordance with law and the resulting ongoing injection of oil
9 industry waste and other fluids into protected California aquifers, per DOGGR's own admissions.
10 Accordingly, Plaintiffs ask this Court to order DOGGR to certify the record by April 22, 2016 and to
11 order a briefing schedule that preserves the Court's July 15 hearing.

12 As to the scope of the record, it is clear from both statute and case law that Plaintiffs' APA
13 cause of action must be decided based on the administrative record to be certified by DOGGR.
14 Government Code section 11350(d), pursuant to which Plaintiffs have brought their APA cause of
15 action, sets forth specifically what evidence a court may consider in determining the validity of a
16 regulation, stating that:

17 (d) In a proceeding under this section, *a court may only consider the*
18 *following evidence:*

19 (1) The rulemaking file prepared under Section 11347.3.

20 (2) The finding of emergency prepared pursuant to subdivision (b) of Section
21 11346.1.

22 (3) An item that is required to be included in the rulemaking file but is not
23 included in the rulemaking file, for the sole purpose of proving its omission.

24 (4) Any evidence relevant to whether a regulation used by an agency is
25 required to be adopted under this chapter.

26 (Gov. Code Sec. 11350(d) [emphasis added]; see also *POET LLC v. California Air*
27 *Resource Board* (2013) 218 Cal.App.4th 681, 745 [confirming that the record for an APA
28 cause of action challenging a regulation is limited to documents set forth at Sec. 11350(d)].)¹

¹ Section 11350(d)(4), in its reference to "[a]ny evidence relevant to whether a regulation used by an agency is required to be adopted under this chapter," addresses evidence related to regulations that followed no prescribed procedure (e.g., off the book regulations), a situation that does not exist here. (See West's Ann. Cal. Gov. § Code 11350 [Law Revision Commission Comments].)

1 Energy Companies have stated that they believe they are entitled to general discovery under
2 Plaintiffs' APA cause of action. To that effect, Energy Companies served notices of deposition on
3 Earthjustice on January 26, 2016. However, Code of Civil Procedure section 20170.010 requires
4 that the proposed discovery lead to admissible evidence, and Gov. Code section 11350(d) expressly
5 limits the scope of evidence allowed in an APA cause of action to a discrete administrative record.
6 Plaintiffs intend to oppose Energy Companies' discovery request pursuant to this Court's procedures
7 for doing so.

8 As to the evidence underlying Plaintiffs' section 1085 writ of mandate claim, Plaintiffs
9 accept DOGGR's position that relevant evidence can be indexed by DOGGR in the form of a record
10 and certified and lodged with the Court by April 22, as DOGGR proposes, subject to limited
11 supplementation, if at all, occurring pursuant to Court approval under applicable administrative law
12 rules.

13 The Court's determination of the nature and scope of DOGGR's legal duties under this claim
14 is predominantly a question of law. To the extent additional evidence may be relevant and
15 admissible, this evidence may be presented to the Court, at the Court's discretion, via stipulations,
16 judicially noticed documents, and supporting declarations and exhibits, as is standard in writ claims.
17 (Cal. Civil Writ Practice (4th ed. 2013) §§7.1, 7.4, 7.5, 7.6, 7.9, 7.18 pp. 164-67, 169, 176-77.)

18 *b. The Briefing Schedule*

19 Plaintiffs request that the APA cause of action be briefed together and at the same time as the
20 section 1085 petition for writ of mandate. The APA cause of action is an administrative record case
21 challenging an agency action and the Court may treat it as a mandamus petition, thereby allowing
22 briefing to occur on the same timeline employed for writs. (See, e.g., *Lee v Blue Shield* (2007) 154
23 Cal.4th 1369, 1378 [court has discretion to regard a complaint for declaratory relief as a petition for
24 a writ of mandate]; *Le Strange v. City of Berkeley* (1962) 210 Cal.App.2d 313, 320 [courts can treat
25 a complaint for declaratory relief as a mandamus petition where the complaint otherwise states a
26 cause of action for mandamus, or is otherwise cumulative to the mandamus claim made in the same
27 action]; see also C.C.P. § 1062.) Accordingly, Plaintiffs submit that this case does not lend itself to
28 a motion for summary judgment and the notice period that accompanies such a motion.

1 Plaintiffs' proposed briefing schedule is listed below. Assuming DOGGR certifies its record
2 on April 22, 2016, Plaintiffs propose filing one 25-page opening brief on May 18, 2016 to address
3 both the APA cause of action and the section 1085 petition for writ of mandate, as both are
4 scheduled to be heard together on July 15, 2016. Opposition briefs would be due on June 14, 2016,
5 giving DOGGR, Energy Companies and Industry Groups 28 days—four full weeks—to respond to
6 Plaintiffs' opening brief.

7 Record Certification: April 22, 2016

8 Plaintiffs' Opening Brief on APA Cause of Action and 1085 Writ Petition: May 18, 2016

9 Opposition Briefs: June 14, 2016

10 Plaintiffs' Reply: June 29, 2016

11 Hearing: July 15, 2016

12 Should the Court grant Plaintiffs' proposed schedule, Plaintiffs request the following page
13 limits: 25 pages for Plaintiffs' single opening brief; 25 pages for any opposition brief; and 30 pages
14 for Plaintiffs' reply brief given that Plaintiffs may be responding to three separate opposition briefs.

15 Finally, Plaintiffs wish to alert the Court of a potential factual development. There is now a
16 possibility that DOGGR's emergency regulations will become identically worded permanent
17 regulations in April 2016. By law, emergency regulations must be converted to permanent
18 regulations within 180 days of their issuance. Cal. Gov. Code § 11346.1(e). To date, DOGGR has
19 requested two extensions of the current emergency regulations, with the last extension for 180 days
20 having been granted on October 19, 2015 and a request for re-adoption for 90 days requested on
21 January 7, 2016. As noted, the currently proposed permanent regulations are identical to the
22 language of the challenged emergency regulations. Plaintiffs submit that the issuance of permanent
23 regulations will change neither the procedural nor substantive posture of this case, and that the case
24 can proceed to the merits on July 15, 2016. Plaintiffs wanted to raise this possibility, however, as it
25 could create additional briefing regarding the APA claim, all of which could be still be handled
26 within the currently proposed briefing schedule and within the briefs themselves.

1 Plaintiffs do not waive their right to seek supplementation of their complaint and request that
2 this Court deny Opposing Parties' request for a 20-day deadline following the certification of a
3 record for Plaintiffs' filing of any motion to amend or supplement the Complaint, as the timing of
4 the emergence of facts warranting amendment or supplementation of the Complaint is not tied to the
5 record and cannot be anticipated.

6 DOGGR's position:

7 a. Record

8 As stated at the January 6, 2016 status conference, DOGGR expects to circulate a draft index
9 of the administrative record to the parties by March 18, 2016. DOGGR proposes to circulate a final
10 certified version of the record by April 22, 2016. DOGGR will oppose plaintiffs' effort to admit
11 extra-record evidence, or submit additional evidence in connection with a reply brief.

12 b. Briefing Schedule

13 DOGGR does not oppose plaintiffs' request for joint briefing on the APA and writ of
14 mandate causes of action according to the schedule proposed by plaintiffs.

15 c. Permanent Regulations

16 The only regulatory action challenged in this case is the adoption of DOGGR's emergency
17 regulations in April 2015. DOGGR believes it would be premature for this Court to consider any
18 future regulations that may or may not be adopted by DOGGR and the Office of Administrative Law
19 in managing or disposing of the instant action.

20 Position of Respondents-in-Intervention:

21 With respect to Plaintiffs' second cause of action for a writ of mandate, the Energy
22 Companies do not object to the briefing schedule or page limits proposed by the Plaintiffs. To the
23 extent that there are any remaining disputes concerning the contents of the certified, administrative
24 record for the second cause of action, the Energy Companies propose that the party or parties
25 objecting to the content of the certified record must file noticed motions concurrently with the filing
26 of Plaintiffs' opening brief and calendared for hearing concurrently with the hearing on the writ, as
27 is contemplated by the analogous rule applied for CEQA cases in Alameda County Superior Court
28 Local Rule 3.335.

1 With respect to Plaintiffs' first cause of action for declaratory relief, the Energy Companies
2 dispute that there is any basis for Plaintiffs to submit pretrial briefing in support of this claim,
3 especially in the context of the joint briefing currently envisioned by Plaintiffs. In arguing in
4 support of this joint briefing, Plaintiffs effectively concede that their claim for declaratory relief is
5 entirely duplicative of their mandamus claim. As already argued in the Energy Companies' Motion
6 for Summary Adjudication as to Plaintiffs' first cause of action and as further shown by the cases
7 cited by Plaintiffs above, a petition for writ of mandate is the proper vehicle for Plaintiffs to assert
8 their claims in this case. Given Plaintiffs' concession that the claim for declaratory relief is
9 duplicative and unnecessary, there is no basis for them to proceed on this claim.

10 To the extent that Plaintiffs rely on a motion for summary adjudication to resolve the legal
11 issues in their claim for declaratory relief, the Energy Companies request that the briefing and
12 hearing of this motion be conducted entirely in accordance with the Code of Civil Procedure.

13 If Plaintiffs do not submit a dispositive motion seeking the legal adjudication of their claim
14 for declaratory relief, then the claim should be heard for trial on July 15, 2016 pursuant to the
15 pretrial standing order set forth in Local Rule 3.35. While Plaintiffs claim that their declaratory
16 relief claim can be adjudicated entirely on the basis of an administrative record, the Law Revision
17 Commission Comments to Government Code section 11350 (which Plaintiffs rely upon for a
18 different point) clearly state that oral testimony is admissible in a claim for declaratory relief under
19 this section. (West's Ann. Cal. Gov. § Code 11350 [30 Cal.L.Rev.Comm. Reports 725 (2000)]
20 [noting that "a court may consider oral testimony in appropriate circumstances (e.g., to judge the
21 credibility of an affiant or declarant)."].) If oral testimony is admissible at trial, then the Energy
22 Companies are undoubtedly entitled to pretrial discovery to ascertain the basis for Plaintiffs' claim
23 and to identify what testimony may be appropriate to put before the Court.

24 Further, the Energy Companies dispute Plaintiffs' contention that the issuance of permanent
25 regulations will have no procedural or substantive effect on Plaintiffs' claims. In fact, the issuance
26 of these permanent regulations will cause Plaintiffs' claims to become moot, and the Energy
27 Companies intend to file a motion to dismiss this action on that basis once permanent regulations are
28 issued that supplant the emergency regulations at issue in the operative pleading in this action.

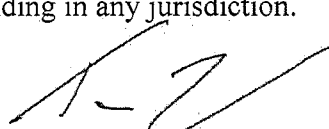
1 **A. Identification of all potential evidentiary issues involving confidentiality or**
2 **protected evidence.**

3 DOGGR anticipates that portions of the record may need to be lodged under seal, and that a
4 protective order as to those portions of the record should be issued. (See Pub. Resources Code, §
5 3234.) DOGGR will propose a stipulation and order regarding confidential evidence before the
6 record is lodged.

7 **B. Detailed description of the procedural posture of the case.**

8 All Parties named in the complaint have been served. There are no unserved or unfiled
9 cross-complaints, nor any related actions pending in any jurisdiction.

10 DATED: January 29, 2016.



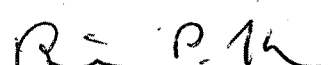
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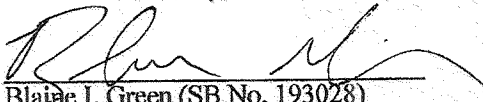
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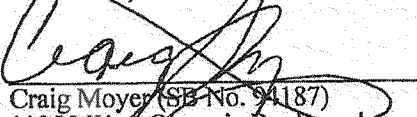
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1 **PROOF OF SERVICE**

2 I am a citizen of the United States of America and a resident of the County of Alameda; I am
3 over the age of 18 years and not a party to the within entitled action; my business address is 50
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5 I hereby certify that on January 29, 2016, I served by electronic mail one true copy of the
6 document herein on the persons named below:


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17 I certify under penalty of perjury that the foregoing is true and correct. Executed on
18 January 29, 2016 in San Francisco, California.

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